FILED
JUN 17 1980
MICHAEL RODAK, JR., CLERK

No. 79-1560

IN THE

Supreme Court of the United States

SAMMY GARRETT,
Petitioner,

vs.

STATE OF ILLINOIS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Printed by the Authority of the State of Illinois—6-80-51

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QUESTION PRESENTED FOR REVIEW

Whether petitioner's suit against the State of Illinois for money damages, is barred by the eleventh amendment?

STATEMENT OF THE CASE

Petitioner was convicted of murder and unlawful use of weapons. He was sentenced to concurrent terms of 20 to 40 years on the murder conviction and 1 to 5 years for the unlawful use of weapons. Petitioner did not appeal the unlawful use of weapons conviction, but did appeal the murder conviction, which was subsequently reversed. (*People* v. *Garrett,* 62 Ill 2d 151, 339 NE2d 753 (1975). Consequently, he was released from prison after serving 5 years.

Petitioner, in November 1976, filed suit in the United States District Court, seeking monetary damages, as well as declaratory relief. The District Court granted the State's motion to dismiss on the ground that the eleventh amendment barred an action seeking money damages from the state. Upon appeal, the Seventh Circuit Court of Appeals affirmed the dismissal. Neither court reached the merits of petitioner's claim.

I.

REASONS FOR DENYING THE WRIT.

Stripped to its core, petitioner's argument is that he be allowed to sue the State of Illinois for money damages. This he cannot do, for the eleventh amendment to the United States Constitution stands as a bar to such a suit.

The eleventh amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Although the literal language of the amendment does not prohibit a suit by a citizen against his own state, it was early recognized by this Court that the amendment did incorporate this prohibition. *Hans* v. *Louisiana,* 134 U.S. 1, 33 L. Ed. 842 (1890).

This Court has recently reaffirmed this principle in *Edelman* v. *Jordan,* 415 U.S. 651, 39 L. Ed. 2d 662 (1974). In *Edelman,* an Illinois citizen filed a class action suit against state officials, claiming the Illinois public aid officials improperly withheld disability payments in a manner inconsistent with federal regulations and the fourteenth amendment. The suit

sought money damages as compensation for benefits wrongfully withheld in the past and declaratory and injunctive relief. The district court declared the Illinois regulations invalid and granted a permanent injunction requiring compliance with the federal regulations. The court also ordered retroactive benefit payments to those persons from whom benefits were wrongfully withheld. The court of appeals affirmed the district court's decision. The Supreme Court reversed that portion of the court of appeal's decision which affirmed the district court's order of retroactive payments. Outlining the historical background of the eleventh amendment, the Court expressed the rule that:

> . . . a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. 39 L. Ed. 2d at 673

In *Edelman,* it was agreed that the eleventh amendment would not bar the district court's judgment that state officials comply prospectively with the federal regulations. However, the state argued and the Supreme Court agreed that the eleventh amendment did bar an award of retroactive monetary payments. The Court differentiated between requiring a state to comply with federal law, even though there may be an impact on the state treasury from an order compelling a state to make reparations for past wrongs. The former has only an ancillary effect on the state treasury and is a permissible action. The latter is identical to an award of damages against the state and thus impermissible under the eleventh amendment. 39 L. Ed. 2d at 673-674. This principle is directly applicable to the instant case because petitioner seeks damages from the state for past wrongs.

The principles enunciated in *Edelman* were relied upon by the Seventh Circuit Court of Appeals to affirm the dismissal of a claim substantially similar to petitioner's herein. In *McDonald* v. *State of Illinois,* 557 F. 2d 596 (7th Cir. 1977), the plaintiff was tried and convicted of murder. Accordingly, he was

imprisoned. Two years later, another man confessed to the murder for which McDonald was convicted and McDonald was released from prison. McDonald filed suit in district court for damages from the State of Illinois and several government officials. He alleged that his wrongful imprisonment was a violation of the fourteenth amendment for which he was entitled to damages. The district court dismissed the case against the state on the grounds that the complaint failed to state a claim for which relief could be granted. The Seventh Circuit affirmed the dismissal on the basis that the eleventh amendment barred actions seeking damages unless the state had waived its immunity. In determining that Illinois had not waived its immunity, the Court noted that the state's consent to be sued extended only to the Illinois Court of Claims. Since the consent was so limited, there was no jurisdiction conferred on the district court to hear the case. The plaintiff contended, however, that the state's immunity did not bar him from pursuing a federal remedy because of his allegation that the monetary limitations on recovery imposed by § 439.8 of the Illinois Court of Claims Act was unconstitutional. The court declined to reach the merits of the argument. The court reasoned that even if it had the ability to render a decision on the constitutionality of the limitations on recovery, it would still not have the power to consider the merits of the plaintiff's case. The court concluded that the question of the constitutionality of the limitations would best be left to the Illinois Court of Claims, which alone had the power to decide the merits of the case. This Court denied certiorari at 434 U.S. 966, 54 L. Ed. 2d 453. Both the reasoning and decision of *McDonald* should control here. As the State of Illinois has not consented to be sued in federal court, this Court has no power to decide the merits of petitioner's case. Further, petitioner attempts, but is unable to distinguish *McDonald*. Petitioner notes *McDonald* is based on the fourteenth amendment, while the fifth amendment is the basis of his suit. But this difference is insufficient to dictate a different result here.

The right of an individual to sue a state in either federal or state court cannot be derived from the laws or constitution of the United States. It can only come from the consent of the state. *Palmer* v. *Ohio,* 248 U.S. 32, 63 L. Ed. 108, 109 (1918). Petitioner does not, as indeed, he could not, claim that the State of Illinois has consented to be sued in federal court. Petitioner argues, rather, that the fifth amendment is an exception to the eleventh amendment's restriction on jurisdiction. Yet, it is well established that a state is not divested of its immunity on the ground that the suit is one arising under the constitution or laws of the United States. *Parden* v. *Terminal Ry. of Alabama,* 377 U.S. 184, 12 L. Ed. 2d 233, 236 (1964). Thus, in *Palmer, supra,* the United States Supreme Court affirmed the decision of the Ohio Supreme Court dismissing an action against the state for an improper taking of property. Despite petitioner's assertion that *Palmer* is not determinative of this case, *Palmer* remains valid authority for the rule that suits by citizens against states are barred by the eleventh amendment. *Palmer* has not been overruled, either explicitly or implicitly. To the contrary, the case recently has been relied upon by several circuit courts. See, *O'Neill* v. *Commonwealth of Pennsylvania,* 459 F. 2d 1, 2 (3rd Cir. 1972); and *Krause* v. *Rhodes,* 471 F. 2d 430, 439 (6th Cir. 1972).

Petitioner cites a multitude of cases for the proposition that the eleventh amendment is not a bar to this action. These cases are all distinguishable from this case. The distinction between the cases cited by petitioner and the instant case is that none of the cited cases involves a suit by a citizen against a state. Petitioner's cases fall into three categories: suits against the federal government; suits against local governments; or suits against government officials allegedly acting without proper authority. The principles of law applicable to those situations are not identical to the principles behind the eleventh amendment which applies only to suits by citizens against states. Suits against any other governmental unit whether federal or local, may or may not be barred by the doctrine of sovereign

immunity, but the eleventh amendment, which alone is at issue here, stands as an absolute bar to citizens' suits seeking damages from the state. In conclusion, petitioner cannot avoid the dictates of the eleventh amendment. The State of Illinois did not consent to his suit and therefore, petitioner is barred from seeking relief from the State in the federal courts.

II.

Petitioner, in basing his claim on the just compensation clause, is seeking an unprecedented expansion of both the definition and application of the just compensation clause of the fifth amendment. No such expansion is warranted.

It is fundamental that the fifth amendment applies only to the United States government. *Fallbrook Irrigation District* v. *Bradley,* 164 U.S. 112, 158, 41 L. Ed. 369 (1896); *Gulf & S.I.R. Co.* v. *Ducksworth,* 286 F. 645, 647 (5th Cir. 1923); *Luedtke* v. *County of Milwaukee,* 521 F. 2d 387, 389 (7th Cir. 1975). Thus, no action will lie against a state, state agency or state officer under the fifth amendment.

Assuming arguendo that petitioner is able to rest his claim against the State on the just compensation clause of the fifth amendment, petitioner's claim does not fall within the parameters of the fifth amendment. The fifth amendment provides that no private property shall be taken for public use without just compensation. Two elements must be present to effectuate that clause: "property" and a "taking". Neither element is present here.

Petitioner has previously identified that the "property" taken from him (during his incarceration) were his body, his right to work and to better himself by obtaining a college degree, his marriage and children, his consortium rights and various other personal and property rights. The meaning of "property" as used in the just compensation clause has never

been construed so liberally as to include such intangible items as these. Rather, the phrase refers only to items of physical property which are subject to ownership.

The concept of "property" as used in this context was defined in *United States* v. *General Motors Corp.*, 323 U.S. 373, 89 L. Ed. 311 (1945). According to the Supreme Court, the construction of the word "property" has been employed to:

> denote the group of rights inhering to the citizen's relation to the *physical thing*, as the right to possess, use and dispose of it. * * *
>
> When the sovereign exercises the power of eminent domain it substitutes itself in relation to the *physical thing* in question in place of him who formerly bore the relation to that thing, which we denominate ownership. In other words, it deals with what lawyers term the individual's "interest" in the thing in question. That interest may comprise the group of rights for which the shorthand term is "a fee simple" or it may be the interest known as an "estate or tenancy for years," as in the present instance.
>
> 89 L.Ed. at 318 (emphasis added; footnotes omitted).

The kinds of property that have been found to be protected by the just compensation clause include: realty and personalty, *King* v. *United States*, 427 F. 2d 767 (Ct.Cl. 1970); licenses and permits, *Jackson* v. *United States*, 103 F. Supp. 1019 (Ct.Cl. 1952); contracts, *Johnson* v. *United States*, 79 F. Supp. 208 (Ct. Cl. 1948); restrictive covenants in deeds, *Meredith* v. *Washoe County School District*, 435 P. 2d 750, 84 Nev. 15 (1968); easements, *Lynn* v. *United States*, 110 F. 2d 586 (5th Cir. 1940); access to highways, *United States* v. *Welch*, 217 U.S. 333, 54 L. Ed. 787 (1910); public franchises, *United States* v. *Brooklyn Union Gas Co.*, 168 F. 2d 391 (2nd Cir. 1948); and mining claims, *Idaho Maryland Mines Corp.* v. *United States*, 104 F. Supp. 576 (Ct.Cl. 1952). While this list is not exhaustive, it serves to show examples of the tangible kinds of property covered by the just compensation clause. The clause

was intended solely to protect individuals from the government's taking of tangible, physical property for the public use and forcing the individual alone to bear the cost of the public improvement. Petitioner's incarceration caused no loss of "property" as recognized by the fifth amendment.

Assuming arguendo that petitioner's enumerated losses constitute "property" within the just compensation clause, petitioner still has no valid claim to compensation. To state a claim under the just compensation clause, there must be a taking of private property for public use. The phrase "taking for public use" refers solely to the government's exercise of its eminent domain power. An obvious example of "taking for public use" is the taking and using of an individual's land upon which to build a public highway. Other kinds of taking by the government will not give rise to a cause of action against the government. Thus, if the government confiscates an individual's property for the sake of the public health the individual is not entitled to compensation. This would be an example of the exercise of the government's police power for which there is no recognized right to compensation. *Smoke Rise Inc.* v. *Washington Suburban San. Com'n.*, 400 F. Supp. 1369, 1382 (D.C. Md. 1975). The government is not required to compensate for elements of value under the exercise of governmental authority other than the power of eminent domain. *United States* v. *Fuller*, 409 U.S. 488, 35 L. Ed. 2d 16, 21 (1973).

Since the State of Illinois was acting pursuant to its police power for which there is no right to compensation, petitioner has no cause of action against the State of Illinois.

Petitioner is not without a remedy. Illinois law provides that the Illinois Court of Claims shall have jurisdiction to hear and determine:

> (c) All claims against the state for time unjustly served in prisons of this State where the persons imprisoned shall receive a pardon from the governor stating that

> such pardon is issued on the ground of innocence of the crime for which they were imprisoned; provided, the court shall make no award in excess of the following amounts: for imprisonment of 5 years or less, not more than $15,000; for imprisonment of 14 years or less but over 5 years, not more than $30,000; for imprisonment of over 14 years, not more than $35,000; and provided further, the court shall fix attorney's fees not to exceed 25% of the award granted.
>
> Ill. Rev. Stat. 1977, ch. 37 § 439.8(c).

Petitioner asserts, however, that the maximum monies recoverable under the Court of Claims Act is inadequate, and, thus, merits this Court's attention.

The State of Illinois, which enjoys the benefit of the doctrine of sovereign immunity and the protection of the eleventh amendment, may be sued only with its consent. The Illinois Legislature has provided limited consent, through the Illinois Court of Claims Act. Since the Illinois Legislature has provided the right to sue the State, and has provided the remedy, the Legislature has the right to limit the amount of recovery. See, *Siefert* v. *Standard Paving Co.*, 64 Ill. 2d 109, 355 N.E. 2d 537 (1976).

In conclusion, petitioner has not shown any grounds upon which a federal court could grant relief. His theories contravene well established principles of law, which do not merit re-examination at this time. Therefore, his petition should be denied.

CONCLUSION

For the foregoing reasons, respondents respectfully pray that the petition for writ of certiorari to the United States Supreme Court be denied.

Respectfully submitted,

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